U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 24 March 2005

CASE NO. 2004-LHC-7

OWCP NO.: 08-121419

IN THE MATTER OF

SON NGUYEN,
Claimant

v.

ELDRIDGE CONSTRUCTION,
Employer

and

TEXAS MUTUAL INSURANCE CO.
Carrier

APPEARANCES:

Quentin Price, Esq.
On behalf of Claimant

Peter Thompson, Esq.
On behalf of Employer/Carrier

BEFORE: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq*. brought by Son T. Nguyen (Claimant) against R. L. Eldgridge Construction (Employer) and Texas Mutual

Insurance Co. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on October 5, 2004, in Beaumont, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs in support of their respective positions. Claimant testified, called Mr. Oaks as an adverse witness and submitted seventeen (17) exhibits which were admitted, including: various Department of Labor findings; medical records and deposition of Dr. Johnston; medical records of Drs. Craig, Domingues and Lintner; vocational records and deposition of William Kramberg; and Claimant's Social Security Statement and income tax forms. Employer called Mary Zersen and introduced thirty-one (31) exhibits, which were admitted, including: medical records and deposition of Drs. Johnston and Domingues; medical records of Drs. Lintner and Craig, Health South Diagnostic Center, Southeast Texas Imaging, Tower Medical Center of Nederland; vocational records and deposition of Mary Zersen; Claimant's personnel records and pay records; Claimant's IRS forms; and various Department of Labor filings.[1]

The parties filed post-hearing briefs.[2] Based upon the parties' stipulations, the evidence introduced, my observation of witness demeanor, and the arguments presented, I make the following findings of fact, conclusions of law and order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on November 26, 2001;

2. The injury occurred during the course and scope of Claimant's employment with Employer;

3. An employer/employee relationship existed at the time of the injury;

[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__: Claimant's exhibits (CX-__, p.__); Employer exhibits (EX-__, p.__); Joint exhibits (JX-__, p.__).

[2] Claimant filed a 55-page post-hearing brief on January 27, 2005. Employer filed a 13-page post-hearing brief on January 27, 2005.

4. Employer was advised of the injury on November 26, 2001;

5. Employer filed Notices of Controversion on July 29, 2002 and April 30, 2003;

6. An informal conference was held with the District Director on April 16, 2003;

7. Claimant reached maximum medical improvement on January 3, 2003; and

8. Employer paid temporary total disability benefits from December 10, 2001 to January 3, 2003 and permanent total disability benefits from January 4, 2003 to present and continuing at a rate of $613.75 per week for a total of $91,303.33. Employer also paid all medical benefits.

II. ISSUES

The parties presented the following unresolved issues:

1. Extent of injuries;

2. Average weekly wage; and

3. Interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant was born in 1953 in Saigon, Vietnam, where he was raised. He testified, however, that his father altered his birth certificate and official papers to indicate he was born in 1961 so he would avoid a military draft during the Vietnam War. In 1979, Claimant immigrated to the United States with his altered papers and has used 1961 as his birth year ever since. (Tr. 35-36). Claimant has a fifth-

grade education. When he arrived in the United States in 1979, Claimant took a six-month English as a second language (ESL) course; he has not taken any additional ESL classes. Claimant only speaks limited English and can understand "easy words" but cannot read or write English. He conceded his job search would be easier if he learned English, but has not sought further language training. (Tr. 38-39, 83-84). Since his accident, Claimant's only income is the money he receives for workers' compensation and Social Security disability. (Tr. 41).

Claimant also enrolled in vocational program for welding when he immigrated to the United States, and earned his welder's certificate in six months. (Tr. 38-40). Claimant has worked as a welder and building pallets, both of which were heavy labor positions requiring a lot of standing, walking, kneeling, squatting and lifting in excess of 80 pounds. He was referred to his first job at Livingston Shipyard by the welding school. At subsequent employers, Rover Palace, T.D.I. and Beacon Marine, Claimant was brought in by his friends who worked there and who spoke both Vietnamese and English. (Tr. 41-45, 49, 84-86). Prior to November 26, 2001, Claimant suffered two work-related accidents which resulted in a broken hand and severed burns on his arm. He only missed two days of work for each injury. (Tr. 45-47).

Claimant was first hired by Employer in September, or October, 2001. Many of his co-workers spoke both Vietnamese and English, and the job did not require much communication, so language was not a barrier. Necessary instructions were given through an interpreter. (Tr. 48, 55). Claimant worked offshore or in the yard, wherever Employer asked him to go. He was working as a welder in the shipyard at Sabine Pass the day of his accident, November 26, 2001. He testified he was climbing down a slippery ladder when he fell six to eight feet, landing on his knees on the steel floor. Claimant indicated he fell onto his left knee more than the right. (Tr. 51-52). There were no witnesses to the accident, but Claimant informed his supervisor of his injury by pointing to his knee. Claimant testified his supervisor could see the injury, and instructed him to go to the hospital, where x-rays were taken of his knees. The films did not show any broken bones. (Tr. 54-56).

After being treated at the hospital, Claimant treated with Dr. Craig and then Employer referred him to Dr. Johnston who performed three different surgeries on his left knee. Claimant testified the first and third surgeries provided him some relief, and overall his knee felt better than it did before the surgeries, and since the first surgery. (Tr. 56-57). However, Claimant testified his knee was unstable, moved back and forth and required him to wear a knee brace. He also experienced

pain and swelling after walking a long time. Claimant testified when he walked, he his pain was a seven or eight out of ten; stretching his leg straight eased his pain. On a normal day when he could sit on the floor, his pain was only a two out of ten. Claimant testified his daily activities after the accident included watering plants, watching television and reading a Vietnamese newspaper. (Tr. 57-64). He used to be responsible for mowing the yard, cleaning the house and other miscellaneous chores which he can no longer perform since the accident. However, Claimant testified he could still drive a car. (Tr. 67, 88).

Claimant testified he treated with Dr. Johnston on an as-needed basis; his last visits were in May, 2003, and June, 2004. At the last visit, in June, 2004, Dr. Johnston injected his knee to relieve his pain. Claimant testified he had two shots, and his doctor would not give him more. The injections made his knee feel numb for a bit, and relieved his pain for four to five months at a time. However, despite the injections, walking continued to aggravate his knee pain preventing him from mowing the lawn and other activities requiring a lot of standing and walking. (Tr. 64-65, 68-69, 88). Dr. Johnston did not prescribe the knee brace, but advised Claimant to wear it if it provided pain relief; on occasion Claimant wears his knee brace under his pants. Claimant testified on cross-examination that he was aware he could do various exercises to strengthen his knee and that Dr. Johnston released him to work in a sitting position if he could move around as needed, for eight hours per day. (Tr. 66, 86-88, 99). Claimant also treated with Dr. Domingues, testifying he had no complaints about said treatment. (Tr. 89).

Claimant testified he received the March 20, 2003 Labor Market Survey and applied for the six jobs listed shortly thereafter. Specifically, Claimant applied at Lofton Staffing Services, Kelly Services and Advance Staffing, but he was not offered any position. (Tr. 69-73). Claimant specifically testified he remembered applying at Advance Staffing who did not hire him because he could not speak English. Claimant later clarified none of the six prospective employers listed in the labor market survey hired him, specifically because he could not speak English and because "of the way he walked." However, in his deposition Claimant did not give his knee as a reason for not being hired. Claimant relied on his son who told him why he was not hired. (Tr. 74-77, 92-95, 97). Claimant further testified he could not remember if the employers actually had openings available at the time he applied. (Tr. 78).

Claimant also received the September 13, 2004 LMS, and applied for the five available jobs listed therein, but was not hired by any of the prospective employers. Of the eighteen positions which may or may not have been available,

Claimant testified he applied in person at ten of the employers listed and contacted the other eight by telephone. He explained his son, who spoke English, actually made the telephone calls. None of the prospective employers offered him a job. (Tr. 78-81). On cross-examination, Claimant testified he has not pursued vocational rehabilitation or re-training, and has not sought assistance from the Department of Labor or the Texas Rehabilitation Commission. (Tr. 89). Between March, 2003, and September, 2004, Claimant only applied to one or two jobs not listed in the LMS. (Tr. 98).

B. Frederick Michael Oaks

Mr. Oaks is an insurance adjustor for Texas Mutual. (Tr. 103). Mr. Oaks testified he attempted to compute Claimant's average weekly wage based on his actual earnings in the year prior to his incident, based on the wages Claimant earned at Employer and at Beacon Marine. The amount he arrived at, $920.63, was what the parties agreed on at the time, and was paid retroactively to the date of the injury. Mr. Oaks stated he did not know if it was accurate or not. (Tr. 104-05).

C. The Medical Evidence

Claimant first treated with Dr. Lance Craig for his knee injury; Dr. Craig noted Claimant presented on November 29, 2001 with swelling, tenderness and pain in his left knee. An MRI was performed on this date, revealing tears in Claimant's meniscus and anterior cruciate ligament (ACL). (CX-6, pp. 1-2). Dr. Craig referred Claimant to Dr. Johnston, a board-certified orthopedic surgeon, who continues to treat Claimant for his knee injury on an as needed basis. Dr. Johnston testified Claimant initially presented with large effusion, instability and tenderness in his left knee; this was consistent with the MRI report of an ACL and meniscus tear. (CX-11, pp. 6-7).

Between November 29, 2001, and August 27, 2002, Dr. Johnston performed three surgeries on Claimant's left knee. The first surgery, in January, 2002, was to repair the torn meniscus. Dr. Johnston testified he hoped to treat Claimant's ACL conservatively, with a brace, rehabilitation and activity modification, but by March, 2002, Claimant required ACL reconstruction as well as a second repair of the meniscus. Dr. Johnston testified the instability Claimant experienced in his left knee following the first surgery resulted in a second tear of the meniscus. (CX-11, pp. 8-10). In August, 2002, Claimant sought a second opinion from Dr. Lintner, who agreed with Dr. Johnston that the second meniscal repair was not successful and would need to be fixed; this was achieved in the third surgery on August 27,

2002. Claimant treated with physical therapy and a knee brace post-operatively, though he still presented to Dr. Johnston with continued pain and swelling. (CX-11, pp. 11-12).

Throughout his treatment of Claimant, Dr. Johnston kept him off of work. On January 3, 2003, he opined Claimant had reached maximum medical improvement with a lower extremity impairment rating of 35% and a whole person impairment rating of 16%. He explained the discrepancy between his rating and Dr. Domingues' impairment rating was a result of Dr. Domingues' failure to assign an impairment for Claimant's quadriceps atrophy. Further, using Dr. Domingues' numbers, Dr. Johnston calculated a lower extremity impairment rating of 33%. (CX-11, pp. 17, 28; CX-5, p. 14).

Dr. Johnston further opined Claimant was totally disabled in that he could not return to his job as a welder. He permanently restricted Claimant from squatting, kneeling, crawling and climbing. (CX-5, pp. 15-17). At his deposition, Dr. Johnston clarified Claimant could not climb ladders and work at heights, nor could he climb stairs repeatedly throughout the day. Also, he testified Claimant could stand and walk for three hours, for a total of six hours out of an eight hour day; Claimant would need to be able to sit as needed. Dr. Johnston restricted Claimant's lifting to 25 pounds, as anything higher would require the use of his lower extremities. (CX-11, pp. 19, 32). Dr. Johnston testified he had no objections to Claimant's performing the assembly line jobs or the security job. He indicated there were no physical limitations on Claimant's ability to drive. (CX-11, pp. 28-29). Dr. Johnston further testified Claimant could communicate in English, but only on a limited basis; he always brought an individual with better English skills to his doctor appointments. (CX-11, p. 31).

Dr. Johnston testified Claimant's current complaints of pain are consistent with his initial complaints. However, he added that there were times where he thought Claimant exaggerated his symptoms, or complained too much, particularly after the first surgery and again after the third surgery. Dr. Johnston further testified that while most people with similar injuries do not suffer chronic long-term pain, Claimant's loss of cartilage since his first surgery may contribute to his ongoing pain. (CX-11, pp. 13-14). Dr. Johnston stated Claimant should wear his knee brace during activity, but does not need it all the time; he explained that the brace may provide subjective pain relief which may be the reason Claimant wears it frequently. However, Dr. Johnston testified the brace is not medically necessary. (CX-11, pp. 20-21).

Dr. Johnston continues to treat Claimant on an as needed basis. Subsequent to January 2003, he only saw Claimant once in May, 2003, for complaints of pain and again on June 25, 2004, for the same. At this last visit, Dr. Johnston prescribed Claimant anti-inflammatory medicine and Darvocet for his pain; he also gave Claimant a cortisone injection in his left knee to ease his pain. (CX-11, pp. 15-16).

Claimant was examined by Dr. Charles Domingues, a board-certified orthopedic surgeon, on two different occasions, at Employer's request. Claimant first presented to Dr. Domingues on February 19, 2003, with meniscal and anterior cruciate ligament tears in his left knee subsequent to his November 26, 2001 fall at work. (CX-7, p. 3; EX-30, pp. 5-7). Dr. Domingues noted Claimant has had three surgeries to repair these tears; x-rays taken in his office that day did not reveal any arthritic changes or joint narrowing. Dr. Domingues reported Claimant had good range of motion in his left knee and assigned him a permanent impairment rating of 15% whole person. Dr. Domingues testified Claimant was at MMI in February, 2003, and did not need further treatment for his leg. (CX-7, pp. 3-5; EX-30, pp. 6-10). In a report dated June 17, 2003, Dr. Domingues further stated Claimant would suffer chronic instability in his left knee, but this would not preclude him from driving, sitting, walking or standing; further, he did not place restrictions on Claimant's use of his upper extremities. (CX-7, p. 2). On January 28, 2004, Dr. Domingues issued a revised impairment rating for Claimant of 25% to the lower extremity. (CX-7, p. 1).

Dr. Domingues next examined Claimant on August 31, 2004, noting Claimant exhibited a large amount of subjective pain, voluntary guarding and only slight objective muscular atrophy. Dr. Domingues testified these complaints were noticeably different than at the first exam in 2003. He assigned Claimant a 15% whole person impairment rating, and a 27% impairment rating of the lower extremity. (EX-1, EX-30, pp. 10-13). Dr. Domingues further testified Claimant complaints of subjective pain would affect his motivation. He explained that long term pain was not normal; he did not notice any palpable swelling in Claimant's left leg at this exam. Further, Dr. Domingues stated Claimant did not need the knee brace for a medical purpose, and indeed Claimant may become overly dependent on the brace thus hindering any strengthening of his leg muscles. (EX-30, pp. 15, 17).

Dr. Domingues also testified Claimant had moderate to good stability in his left knee, despite his prior notes that Claimant would suffer chronic instability and restricted Claimant from twisting his knee secondary to his knee instability. He

added that Claimant's condition would not affect his ability to walk, stand, sit, drive, bend, kneel, climb stairs and ladders, or stoop. He did not place any restrictions on Claimant's ability to lift, stating that Claimant's knee should withstand lifting 25 pounds frequently and up to 50 pounds occasionally. Dr. Domingues did restrict Claimant from squatting. (EX-30, pp. 15-17, 21).

On cross-examination, Dr. Domingues testified all complaints of pain are subjective and Claimant could actually be hurting. He acknowledged that pain alone can be debilitating. Further, Dr. Domingues stated a one centimeter difference in the size of a person's quadriceps is normal; any difference one and one-half centimeters or more is indicative of an injury or problem with the leg. At his February, 2003, examination of Claimant, Dr. Domingues noted a 2.5 centimeter discrepancy in the quadriceps. (EX-30, pp. 19-20; EX-1, p. 4).

D. The Vocational Evidence

Mary Zersen testified at the hearing that she has worked in the field of vocational rehabilitation since 1983. (Tr. 108-110). Carrier, Texas Mutual Insurance, contacted Ms. Zersen in December, 2002, to conduct a vocational assessment of Claimant and identify suitable alternative employment.[3] Ms. Zersen performed a vocational assessment report on January 16, 2003, based largely off of her interview with Claimant on January 14, 2003. (Tr. 112-13; EX-22, p. 1). In her report, Ms. Zersen noted Claimant seemed to be in pain, experienced swelling in his left knee and sat on the floor to stretch out his leg. She also noted Claimant walked with an antalgic gait and could not stand for any length of time. Ms. Zersen stated Claimant had a third grade education in Vietnam and with only three months of English as a Second Language (ESL) courses, his English abilities were very limited. She testified he received his welding certificate and could understand some English in the context of welding. Overall, Ms. Zersen opined Claimant would have a lot of difficulty in securing employment secondary to his inability to read, write or speak English, as well as his limited education in his native language of Vietnamese. (EX-22, pp. 1-4).

Ms. Zersen acknowledged Dr. Domingues restricted Claimant only from twisting his knee and squatting, whereas Dr. Johnston limited Claimant to walking a maximum of three hours per day, lifting no more than 25 pounds and no climbing

[3] Ms. Zersen's reports were based off of her interview of Claimant on January 16, 2003, as well as his medical records from Dr. Johnston and Dr. Domingues and the depositions of Claimant and both doctors. Ms. Zersen also had the opportunity to review Mr. Kramberg's September 10, 2004 report. (Tr. 110-12).

of ladders or working at heights. Dr. Johnston also testified in his deposition Claimant would need to sit down and rest every twenty to thirty minutes. Ms. Zersen testified a majority of the jobs listed in the labor market survey reflected Dr. Johnston's more prohibitive physical restrictions, but not the resting requirement, and some jobs were pursuant to Dr. Domingues' restrictions. (Tr. 128-32, 137).

Ms. Zersen focused her first labor market survey, issued on March 20, 2003, in the Beaumont and Port Allen areas. The survey was comprised of six jobs, including:

Employer	**Position/Job**	**Physical Demand**	**Hourly Wages**
Lofton Staffing Services	Assembler	Sit down position	$6.85
Lofton Staffing Services	Parking security attendant	Use golf cart to conduct parking lot surveillance	$6.00-$9.00
Kelly Services	Bench work assembly	Sit down position, occasional walking	$6.85
Advanced Staffing	Bench work assembly	Sit down position, frequent hand use	$6.00-$8.00
Labor Ready	Bench work assembly	No openings	$6.85
Goodwill Industries	Variety	Will place within restrictions	Variety

(EX-21, pp. 2-4; Tr. 141-43, 149). All of the positions in her report had physical demand levels of sedentary to very light and were within the physical restrictions assigned by Dr. Johnston. Ms. Zersen testified she referred to the generic description of the DOT requirements when she spoke with the employers about the job requirements, and focused more on what the person actually did in the job. (Tr. 114-15, 143, 159; EX-21, p. 4). In general, the jobs did not all involve constant sitting; some required occasional standing and/or walking. She acknowledged that under the DOT descriptions of sedentary and light work there were restrictions on how often an individual can stand and walk during the day. Nonetheless, all of the jobs listed in the initial survey were within Dr. Johnston's restrictions. (Tr. 157, 163-64).

Ms. Zersen testified the employment agencies, including those listed in her 2003 labor market survey, acted as a Human Resources department for many local companies. On cross-examination, Ms. Zersen stated she did not actually speak with the employers about the jobs, but received her information from the agencies listed in the survey. She specified Goodwill Industries works to place people in jobs regardless of their disability or language capabilities. Further, she testified that in her experience the Work Source Center (Texas Workforce Commission) has

been successful at returning people to work; they are particularly familiar with the local Vietnamese community and placement opportunities, as Ms. Zersen's contact in Port Arthur was Vietnamese herself. (Tr. 117, 129-30, 146-48).

In June, 2004, Claimant retained vocational rehabilitation counselor William Kramberg to perform a vocational assessment.[4] Mr. Kramberg testified a person's age, education, work experience, level of skill; geographic area and physical limitations are all considerations when determining that person's employability. Motivation to return to work is another important factor in actually securing employment. (CX-14, pp. 15, 18). He specified Claimant's English skills were virtually non-existent, that he only had an elementary education in his native language of Vietnamese, and was older than 50, as his 1961 birthday was fabricated by his father. Claimant's work experience was limited to welding and building wooden shipping pallets. He was restricted from lifting, standing, walking, bending, twisting, kneeling, stooping, squatting, climbing and balancing; Mr. Kramberg noted Claimant complained of pain and swelling in his left knee which was extreme upon exertion. (CX-9, pp. 2-3; CX-14, pp. 6-14, 38). Mr. Kramberg did not perform any educational testing, but completed a transferable skills analysis which did not result in any jobs Claimant was capable of performing. (CX-14, pp. 10-12, 60).

Mr. Kramberg disagreed with Ms. Zersen's labor market survey, opining that the jobs listed were not suitable for Claimant, given his age, physical capabilities, and language barrier. Specifically, he testified the job descriptions in the survey were insufficient to determine if the physical requirements were within Claimant's restrictions. Mr. Kramberg emphasized the importance of contacting the actual employer to understand the exact requirements of the jobs, as an assembly position could be heavy duty or sedentary duty. As such, he contacted the employment agencies and inquired about the positions listed. He testified Lofton Staffing rarely had assembly positions, and when they did the jobs were in the heavy physical demand level; Kelly Services only had temporary positions, none were currently available and they required basic English skills; and Goodwill Industries terminated its job placement program due to insufficient funding, although it had a temporary placement program for janitorial and clerical work. Mr. Kramberg testified Claimant's welding position was skilled, whereas these assembly positions

[4] Mr. Kramberg was unavailable to testify at the hearing, and thus his deposition was taken in connection with this matter on December 19, 2004. (CX-14). Mr. Kramberg was forwarded copies of Claimant's medical records from Dr. Johnston and Dr. Domingues and reviewed Ms. Zersen's March 2003 labor market survey prior to his August 2, 2004 interview with Claimant. Additionally, Mr. Kramberg reviewed the trial transcript prior to his deposition testimony. (CX-9, p. 1; CX-14, pp. 6-8).

were unskilled or semi-skilled. (CX-14, pp. 24-25, 29-30, 56, 67). Mr. Kramberg also testified the State of Texas requires all noncommissioned security guards to pass an examination, which he opined Claimant would not pass given his education and inability to understand English. (CX-14, pp. 24-25). In short, Mr. Kramberg testified none of the jobs identified in the March, 2003, labor market survey constituted suitable employment which was reasonably available to Claimant given his physical restrictions and language barrier. He opined Claimant did not have any wage earning capacity at this time. (CX-14, p. 30).

In her rebuttal testimony, Ms. Zersen countered that Goodwill is still in the business of placing people in jobs pursuant to their physical abilities, that Lofton Staffing informed her Claimant's language skills would not automatically disqualify him from consideration and that Kelly Services had assembly positions available in 2003 and would allow him to bring an interpreter. (EX-31, pp. 4-10). Moreover, she testified transferable skills analyses are only one tool in vocational rehabilitation; she does not like to rely heavily on them, instead preferring to focus on the Dictionary of Occupational Titles and what the Claimant is actually capable of performing. She explained she considered Claimant's transferable skills, but she did not perform a computerized analysis. (EX-31, pp. 11, 14-15).

Ms. Zersen supplemented her labor market survey on September 13, 2004, with additional medical evidence, depositions and Claimant's wage and personnel records; the report noted Claimant was not able to squat, kneel, crawl or climb. The survey listed five available jobs, including:

Employer	**Job/Duties**	**Hourly Wages**
International House of Pancakes	Dishwasher – wash dishes, help maintain kitchen work area	$5.15 35-40 hours
Comfort Inn	Housekeeping – lift supplies and linen; clean rooms	$5.15 32-40 hours
New China	Kitchen Help – stand, bend, help cook, clean kitchen	$5.15 30 hours
Fairfield Inn	Housekeeping	$5.15; 25 hours
Patriot Security	Unarmed Guard - frequent sitting	$5.15-$7.00 40 hours

Many of the jobs listed offered on-site training and International House of Pancakes, Comfort Inn, New China, Hilton, Fairfield Inn and Patriot Security were willing to hire a non-English speaker. (Tr. 117-22; EX-20, pp. 2-4). The supplemental report also included 18 positions which were not currently available,

but the employers reported frequent turn-over rates or anticipated the positions would be available in the near future. Of the 18 listings, two positions were for a shop welder. Ms. Zersen testified the positions were within Dr. Domingues' restriction of medium physical demand level, but they were not consistent with Dr. Johnston's restrictions. Overall, based on this supplemental labor market survey, Ms. Zersen concluded Claimant was employable at a projected $340 per week. (Tr. 161-62; EX-20, pp. 4, 13-14).

Mr. Kramberg responded the September, 2004, labor market survey also failed to identify suitable alternative employment for Claimant, given his physical restrictions and language barrier. In general, he testified kitchen positions were not within Claimant's physical abilities, as they involve fast-paced environments and little opportunity to sit down as needed. Furthermore, the housekeeping positions exceeded Dr. Johnston's restrictions as the descriptions did not indicate Claimant could sit down as needed, and required him to bend, stoop, push, pull and lift 30-50 pounds. (CX-14, pp. 31, 33-37). Mr. Kramberg opined none of the jobs listed were suitable in light of Claimant's physical restrictions and language barrier. Specifically, the IHOP, Comfort Inn, and Fairfield Inn positions all exceeded his physical capabilities. The Patriot Security position required Claimant to pass a state test and New China informed Mr. Kramberg they did not have any positions open. Additionally, Mr. Kramberg opined the cook positions were skilled, for which Claimant did not possess applicable transferable skills. (CX-14, pp. 32,62-67).

Mr. Kramberg concluded Claimant had substantial barriers to employment in that he spoke no English, was over 50 years old, had a visible disability, was restricted to sedentary to light duty work with an ability to change positions as needed, had pain care issues, had been unemployed for three years, had no skills transferable to a light or sedentary position, lived in a city with double-digit unemployment rates and was approved for Social Security Disability (SSD) benefits. Mr. Kramberg testified less than .5% of individuals receiving SSD return to work; further, the Texas Workforce Commission has an 18% success rate at returning individuals to work. (CX-14, pp. 46-49).

At the end of her 2003 report, Ms. Zersen recommended Claimant get involved with Goodwill Industries' job program and register with the Texas Rehabilitation Commission. Ms. Zersen also recommended Claimant seek further education, training and pursue ESL courses to improve his opportunity for employment; however, she conceded this may be difficult for someone of Claimant's age and experience. Although Ms. Zersen acknowledged Claimant

faced some barriers to gainful employment, she testified there were resources available to him to overcome those barriers, including a job counselor and interpreter who could accompany him on interviews and assist him in finding employment. (Tr. 151-53).

Specifically, Ms. Zersen testified if Claimant had better English skills she could find more job options which may pay higher. (Tr. 114-15). She explained Claimant's language limitations to prospective employers and each of them indicated they were willing and capable of hiring someone who did not speak fluent English. She thus testified all the jobs included in the survey were reasonably available to Claimant. (Tr. 115-16). Ms. Zersen indicated some employers informed her they were unwilling to hire someone who did not speak English; thus, she opined Claimant would have more job opportunities if he could speak English. She stated both Queen of the Vietnamese Catholic Church and First Baptist Church in Port Arthur, Texas, offered ESL classes. (Tr. 120-21).

Ms. Zersen testified that Claimant appeared uncertain about what to do with his future and generally confused with "the system." She also stated that she did not believe Claimant would be able to return to heavy welding at Employer. (Tr. 125-26). Ms. Zersen did not perform a transferable skills analysis in Claimant's case; however she later testified each of the jobs was entry-level and the employers were willing to provide training. (Tr. 132, 164).

Ms. Zersen testified further that an individual's desire to return to work was an essential, if not the single most important, component to his success at securing employment. (Tr. 122-23). She opined Claimant's uncertainty about his future and job options may translate into hesitancy during a job search, which may negatively impact his ability to find jobs. (Tr. 155-156). Ms. Zersen testified she has placed seven people back to work in the past six months, including an individual who only spoke Vietnamese, had minimal education and suffered a knee injury, as well. (Tr. 156). Mr. Kramberg agreed with Ms. Zersen that a person's motivation to return to work is an important factor. However, he explained that Claimant's learning English is not just a question of motivation; Claimant has lived in the United States for many years and has never taken the initiative to learn English, so he is not likely to do so now. (CX-14, pp. 84-85).

V. DISCUSSION

A. Contentions of the Parties

Claimant contends he is permanently totally disabled, as Employer has failed to establish any jobs in his geographic area which are suitable in light of his physical restrictions and reasonably available to him when considering his limited English skills. Specifically, Claimant contends as Dr. Johnston was Claimant's treating physician and gave opinions based on objective reasoning, his findings and testimony should be given more weight than those of Dr. Domingues. Thus, many of the jobs exceeded Claimant's physical abilities. Further, Claimant argues Ms. Zersen's reports should not be credited, as she did not contact the employers directly, did not know if the jobs were temporary or permanent, did not exhibit a familiarity with Claimant's geographic area, and failed to overcome her own statement that Claimant would have a difficult time securing employment due to his physical restrictions, lack of education, age and limited English skills. In the alternative, if Claimant is found permanently partially disabled, he contends his impairment rating should be 35%, as calculated by Dr. Johnston. Finally, Claimant contends his average weekly wage is $920.63, which is fair, reasonable and the amount Employer based Claimant's benefits on following his accident.

Employer contends Claimant's average weekly wage calculations should not include any of his post-injury earnings, thus he is only entitled to an average weekly wage of $879.25. Employer also asserts Dr. Domingues' opinions regarding Claimant's physical restrictions and permanent impairment rating should be credited over those of Dr. Johnston. Additionally, it contends Ms. Zersen identified many jobs which were available to Claimant and suitable in light of his physical restriction. Specifically, her labor market surveys included jobs which were of the light physical demand level and were at employers who indicated to her they would be willing to consider someone who did not speak English. As such, Employer argues it established suitable alternative employment which Claimant failed to rebut through a diligent job search, evidenced by the fact that he only applied for a few jobs and made no effort to learn English and thus improve his employability. As such, Employer contends Claimant is permanently partially disabled and entitled to 27% of 288 weeks of compensation benefits under Section 908 (c)(2) of the Act.

B. Extent of Disability

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10)(2003). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

In the present case, the parties stipulated, and I find, that Claimant reached MMI on January 3, 2003.

(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he

cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In the present case, the parties agree Claimant is unable to return to his job as a welder. Dr. Johnston, Claimant's treating physician restricted Claimant from squatting, kneeling, crawling and climbing. As such, he did not release Claimant to return to his welding position, which required Claimant to maneuver in tight spaces. Further, Employer's physician, Dr. Domingues, testified Claimant would suffer chronic instability in his knee, for which he suggested Claimant avoid twisting and squatting. Thus, the medical evidence indicates Claimant cannot return to his former position, and I find Claimant has established a *prima facie* case of total disability.

(2) Suitable Alternative Employment

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C. & P. Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994). If the claimant is successful in establishing a *prima facie* case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). An injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. *Rinaldi v. General Dynamics Corporation*, 25 BRBS at 131 (1991); *Director, OWCP v. Bethlehem Steel Corporation (Dollins)*, 949 F.2d 185, 186 n. 1 (5th Cir. 1991).

In the present case, the parties agree Claimant is unable to return to his job as a welder at Employer. As such, Claimant has presented a *prima facie* case of total disability and the burden now shifts to Employer to establish suitable alternative employment to support a finding of partial disability.

Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, 661 F.2d at 1042. *Turner* does not require employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." *P & M Crane Co., v. Hayes*, 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc., v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Company*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); *See generally Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. *See generally P. & M. Crane Co.*, 930 F.2d at 431; *Villasenor, supra*. Further, a claimant may rebut evidence of suitable alternative employment if he demonstrates that he diligently searched for a job but was unable to obtain a position. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222 (5th Cir. 2001); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1040 (5th Cir, 1981). A diligent job search "involves an industrious, assiduous effort to find a job by one who conveys an impression to potential employers that he really wants to work." *Livingston v. Jacksonville Shipyards, Inc.*, 33 BRBS 524, 526 (ALJ).

In the present case, Ms. Zersen testified Claimant has some opportunity for post-injury employment, as evidenced by the jobs listed in her two labor market

surveys. However, Ms. Zersen also testified Claimant would have a very difficult time finding a job, given his physical restrictions, lack of education and inability to understand English. Ms. Zersen's first survey listed six jobs, including bench work assembly and a security guard position. I find that the Labor Ready listing does not constitute suitable alternative employment as no positions were available at the time of the survey. Additionally, Ms. Zersen failed to list any specific position available with Goodwill Industries, thus that listing does not satisfy the requirement for suitable alternative employment, either. Of the four remaining positions, three were bench assembly work, which Ms. Zersen noted were seated positions involving frequent reaching and occasional standing. The Patriot Security guard position involved driving a golf cart to conduct surveillance of a parking lot. I find these positions to be within the physical restrictions assigned to Claimant by Dr. Johnston and Dr. Domingues.

However, the availability of these four positions was rebutted both by Mr. Kramberg's testimony and Claimant's diligent job search. First, Mr. Kramberg testified the State of Texas required all non-commissioned security guards to pass a written exam; when he talked to Patriot Security they informed him of the same. As Claimant has an elementary education and does not read, write or speak English I find it is extremely unlikely he would pass the required exam and thus the security guard position is not available to him. Moreover, Mr. Kramberg contacted Lofton Staffing Services who informed him their assembly positions, when available, were in the heavy physical demand category. Additionally, Kelly Services informed Mr. Kramberg they did not have permanent positions available and Claimant would need to have a basic understanding of English to be considered. As such, it does not appear these jobs satisfy the requirements for suitable alternative employment under the Act. Even though Ms. Zersen attempted to rehabilitate her labor market survey by confirming the accuracy of her report with the employers, this does not overcome the fact that Claimant made a diligent job search which was not successful. Claimant specifically testified he applied at Kelly Services, Lofton Staffing and Advance Staffing, and failed to secure a job through any of these agencies. As such, I find Claimant made a diligent job search rebutting any suitable alternative employment identified by Employer.

Employer contends Claimant failed to show he diligently sought employment, as he failed to learn English in order to improve his employability. I find that this information is not relevant to the issue of suitable alternative employment. Employers must take their claimants as they find them. Here, Employer was willing to hire Claimant even though he did not speak English. Just as claimants cannot be required to return to high school, complete college or

relocate to a different city with better job opportunities in order to establish a diligent job search, nor can Claimant be required to learn English in order to satisfactorily rebut any finding of suitable alternative employment.

I further find Ms. Zersen's September 2004 labor market survey is not sufficient to establish suitable alternative employment. The jobs listed therein included cook, kitchen help, security guard and housekeeping. The security guard position is not suitable or available to Claimant for the reasons discussed above. Further, the labor market survey does not include the physical demand requirements of the remaining positions listed. It is not known how much standing, walking, sitting, kneeling, bending or lifting is necessary to perform these jobs, thus it is not possible to determine if they are within Claimant's physical restrictions or not. Notwithstanding, I find many of the positions would appear to be outside Claimant's physical restrictions as assigned to him by Dr. Johnston. As Dr. Johnston was Claimant's treating physician I find his opinions and restrictions shall be credited over those of Dr. Domingues, who only examined Claimant on two occasions at the request of Employer/Carrier. Moreover, I find Dr. Johnston's restrictions are more realistic in light of Claimant's knee injury than those of Dr. Domingues. While the 2004 labor market survey indicates Claimant is unable to squat, kneel, crawl or climb, Ms. Zersen failed to acknowledge Claimant's additional restrictions on standing, walking and lifting. Thus, the kitchen work and housekeeping jobs are not suitable for Claimant in that they do not allow him to sit down as necessary and may involve lifting beyond 25 pounds. Additionally, the eighteen jobs listed which were not actually available do not constitute suitable alternative employment under the act, by virtue of their unavailability.

Thus, I find the jobs listed in the 2004 survey do not constitute suitable alternative employment. Claimant was able to successfully rebut the availability of the jobs in the 2003 labor market survey through his diligent job search and Mr. Kramberg's discrediting of the labor market surveys. As such, I find Employer has failed to meet its burden of establishing suitable alternative employment. Therefore, Claimant continues to be permanently totally disabled.

In the alternative, if Employer had shown suitable alternative employment, I find Claimant would have been permanently partially disabled, and entitled to scheduled benefits pursuant to § 908 (c)(2) for loss of his left leg. Dr. Johnston assigned Claimant a lower extremity impairment rating of 35%. Dr. Domingues assigned Claimant a lower extremity impairment rating of 25%, then 27%. Dr. Johnston explained the discrepancy was a result of Dr. Domingues failing to assign an impairment rating for Claimant's quadriceps atrophy; using Dr. Domingues'

numbers, Dr. Johnston calculated a 33% lower extremity impairment rating. As Dr. Domingues measured a 2.5 centimeter difference in Claimant's quadriceps, and later testified anything over 1.5 centimeters was indicative of an injury, I find Dr. Johnston's calculations which include the quadriceps atrophy are more reasonable. As such, I conclude Claimant suffers a 35% impairment in his left lower extremity. If he is found to be permanently partially disabled, he would be entitled to compensation equal to 35% of 288 weeks' compensation, pursuant to § 908 (c)(2).

E. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000); 33 U.S.C. § 910(d)(1). When neither Section 10(a) nor Section 10(b) can be "reasonably and fairly applied" Section 10(c) is an applicable catch-all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c) (2002); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998).

In the present case, there is no evidence of Claimant's daily wages, as required by § 10(a), and no evidence of the daily wages of a similarly situated employee, as required by § 10(b); thus, I find § 10(c) may be used to determine Claimant's average weekly wage at the time of injury. Claimant contends he is entitled to an average weekly wage of $920.63, based on his total earning for 2001 at both Employer and Beacon Maritime, including post-injury wages at Employer for light duty work. Employer contends Claimant's average weekly wage calculations should not take into consideration his post-injury earnings at Employer. I agree. The purpose of Section 10 is to arrive at the pre-injury wage earning capacity of the claimant. *See Gilliam v. Addison Crane Co.*, 21 BRBS 91, 92-93(1987). Claimant's earnings in 2001, prior to his November 26, 2001 accident, amount to $41,348.36. This includes the $35,388.10 he earned at Beacon Maritime, Inc. in 2001 (EX-27, p.2) and $4,960.26 he earned at Employer up until the time of his injury on November 26, 2001.[5] Both parties contend the total earnings in 2001 should be divided by the actual number of weeks Claimant worked. Because there is no evidence of the number of weeks Claimant worked at Beacon Maritime, Inc., I find it is most reasonable to divide Claimant's earnings

[5] I find it would be inappropriate to use Claimant's W2 form issued by Employer for the year 2001, as it presumably contains post-injury earnings. In my calculations above, I have included the $43.50 Claimant earned in the hours prior to his accident on November 26, 2001. (*See* EX-26, p. 8; EX-17 and EX-18).

from January 1, 2001 through November 26, 2001, by 47, the number of weeks in that same time period. Thus, Claimant has an average weekly wage of $879.75.

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from November 26, 2001 to January 3, 2003, based on an average weekly wage of $879.75.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to Sections 908(a) and 910(f) of the Act from January 3, 2003 to present and continuing, based on an average weekly wage of $879.75.

3. Employer shall be entitled to a credit for all wages paid to Claimant after November 26, 2001 and for compensation previously paid to Claimant.

4. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J.KENNINGTON
ADMINISTRATIVE LAW JUDGE